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15 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
16 IN AND FOR THE COUNTY OF YAVAPAI

17 STATE OF ARIZONA,

18 Plaintiff,

19 vs.

20 STEVEN CARROLL DEMOCKER,

21 Defendant.

) No. P1300CR20081339

) Div. 6

) **MOTION TO EXCLUDE**  
) **TESTIMONY OF GREGORY**  
) **COOPER PURSUANT TO**  
) **ARIZONA RULE OF EVIDENCE**  
) **702**

22 Steven DeMocker hereby moves to preclude the testimony of Gregory Cooper  
23 under Arizona Rule of Evidence 702.<sup>1</sup> This Motion is supported by the Due Process,  
24 Confrontation, and Eighth Amendment clauses of the United States Constitution and  
25  
26

27 <sup>1</sup> Mr. Cooper is also the subject of a separately filed motion to exclude based on his late disclosure.  
28

SUPERIOR COURT  
YAVAPAI COUNTY, ARIZONA

2010 MAR 10 PM 4:04 ✓

JEANNE HICKS, CLERK

BY: S. FIELDS

1 counterparts in the Arizona Constitution, Arizona Rules of Evidence, Arizona Rules of  
2 Criminal Procedure and the following Memorandum of Points and Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Rule 702, Arizona Rules of Evidence, provides that an expert may testify about a  
5 matter of “scientific, technical or other specialized knowledge” that will assist the trier of  
6 fact to understand the evidence or to determine a fact in issue. Ariz. R. Evid. 702. “The  
7 Rules of Evidence, and Rule 702 itself, erect barriers to admission of all opinion  
8 evidence: the evidence must be relevant, the witness must be qualified, and the evidence  
9 must be the kind that will assist the jury.” *Logerquist v. McVey*, 196 Ariz. 470, 489, ¶ 57,  
10 1 P.3d 113, 132 (2000). Rule 702 permits a qualified witness to testify in the form of an  
11 opinion if it would assist the trier of fact to understand the evidence or determine a fact in  
12 issue. Ariz. R. Ev. 702; *Gemstar Ltd. v. Ernst & Young*, 185 Ariz. 493, 505, 917 P.2d  
13 222, 234 (1996) (stating trial court has broad discretion when determining whether a  
14 witness is competent to testify as an expert).

15  
16 **I. Expert Testimony Must be of Scientific, Technical, or Other Specialized  
17 Knowledge.**

18 Expert testimony is inadmissible if it concerns factual issues that are within the  
19 knowledge and experience of ordinary lay people. Conversely, expert testimony is  
20 permitted only when the subject is beyond the common experience of most people and  
21 where the opinion of an expert will assist the trier of fact. If a matter for expert testimony  
22 is of such common knowledge that a person of ordinary education and background could  
23 reach as intelligent a conclusion as an expert, the testimony should be precluded. *State v.*  
24 *Williams*, 132 Ariz. 153, 160, 644 P.2d 889, 896 (1982). Expert opinions will be rejected  
25 where facts can be intelligently described to and understood by jurors so that they can  
26 form reasonable opinions for themselves. *Shell Oil Co. v. Gutierrez*, 119 Ariz. 426, 434,  
27 581 P.2d 271, 279 (App. 1978). The test “is whether the subject of inquiry is one of such  
28

1 common knowledge that people of ordinary education could reach a conclusion as  
2 intelligently as the witness ....” *State v. Chapple*, 135 Ariz. 281, 292, 660 P.2d 1208, 1219  
3 (1983) (citing *State v. Owens*, 112 Ariz. 223, 227, 540 P.2d 695, 699 (1975)).

4 Mr. Cooper’s testimony does not concern scientific, technical or other specialized  
5 knowledge that would assist a trier of fact and should be precluded pursuant to Rule 702.  
6 Mr. Cooper is identified by the State as a “criminologist.” The State’s proffer indicates  
7 that Mr. Cooper will testify on “behavioral aspects of the crime scene” including the  
8 following:

- 9 • Signature aspect of the crime: behavior unnecessary to commit crime
  - 10 ○ Possible overkill
  - 11 ○ Crime scene staging
  - 12 ○ Personal motivation gain not theft/not sexual
  - 13 ○ Anger, rage personal animosity
  - 14 ○ Punished to death
- 15 • Crime Classification
  - 16 ○ Personal cause homicide
- 17 • Modus Operandi: Behavior necessary to commit crime
  - 18 ○ Effect escape
  - 19 ○ Protect identity
  - 20 ○ Ensure success of crime
  - 21 ○ Logical and rational
- 22 • Victimology
  - 23 ○ Low risk victim, at most medium
  - 24 ○ Getting divorce increases risk
  - 25 ○ Lower risk level higher probability victim and offender knew each other
  - 26 ○ Victim targeted

- High risk victim – crime of opportunity

Although Mr. Cooper has not provided any report and the State has not disclosed any other details in compliance with Rule 15.1, these disclosed topic areas are not the proper subject of expert testimony. Mr. Cooper's speculation or opinion on these matters is neither scientific, technical or specialized and is not the proper subject of expert testimony under Rule 702.

The State's label of Mr. Cooper's testimony is revealing in this regard: "behavioral aspects of the crime scene." Crime scenes do not behave. People do. The State is attempting to have Mr. Cooper speculate for the jury about the kind of person who committed the crime to draw an inference that the crime was committed by someone who knew Ms. Kennedy and who was angry, i.e. the State speculates, Mr. DeMocker. Likewise, the State seeks to have Mr. Cooper speculate to the jury about how the crime may have been committed to draw an inference that the crime was committed in the way the State theorizes, in the absence of any physical evidence to support its theory.

This kind of opinion testimony is routinely excluded by Arizona courts. See *Adams v. Amore*, 182 Ariz. 253, 255 (1994) (reversing judgment based on improper admission of expert testimony about whistleblower "profile," holding the testimony was nothing but an opinion on how the jury ought to decide the case and invaded the province of the jury). Expert testimony on the question of whom to believe is nothing more than advice to the trier of fact on how to decide the case. Such testimony was not legitimized by Rule 704, and is not admissible under Rule 702. The same principle applies to expert opinion testimony on whether the crime occurred, whether the defendant is the perpetrator, and like questions. See *State v. Moran*, 151 Ariz. 378, 383, 728 P.2d 248, 253 (1986) (finding error under 702 and 704 to admit testimony that victim's behavior and personality were consistent with the crime having occurred); see also *State v. Montijo*, 160 Ariz. 576, 774 P.2d 1366 (App. 1989). An expert's belief in a witness's

1 credibility “has never been a permissible subject of expert opinion less the trial process  
2 return to the discredited notion of marshalling adherents of either side as oath takers.”

3 *Moran*, 151 Ariz. at 383, 728 P.2d at 253, citing M. UDALL & J. LIVERMORE, LAW  
4 OF EVIDENCE § 22, at 30-31 (2d ed. 1982).

5 Mr. Cooper’s proposed testimony is not based on scientific, technical or other  
6 specialized knowledge and should be excluded under Rule 702.

7  
8 **II. An Expert Must Be Qualified to Testify About the Subject Matter of His**  
9 **Opinions.**

10 “[T]he trial court determines in each case ‘whether the expertise of the witness is  
11 applicable to the subject about which he offers to testify.’” *Gemstar, Ltd. v. Ernst &*  
12 *Young*, 185 Ariz. 493, 505, 917 P.2d 222, 234 (1996) (quoting *Englehart v. Jeep Corp.*,  
13 122 Ariz. 256, 258, 594 P.2d 510, 512 (1979)). To qualify to testify as an expert witness,  
14 the witness must possess expertise that is applicable to the subject about which he intends  
15 to testify, and he must have training or experience that qualifies him to render opinions  
16 which will be useful to the trier of fact. *Webb v. Omni Block, Inc.*, 216 Ariz. 349, 352,  
17 166 P.3d 140, 143 (App. 2007). The party offering expert testimony must show that the  
18 witness is competent to give an expert opinion on precise issue about which he is asked to  
19 testify. *Gaston v. Hunter*, 121 Ariz. 33, 51, 588 P.2d 236, 344 (App. 1978). An expert  
20 will be excluded if he (1) has no relevant training or experience, (2) does not detail the  
21 basis for his opinions and conclusions, and (3) does not establish that his opinions and  
22 conclusions were based on data that was reasonably relied upon by experts in the field.  
23 *Holy Trinity Greek Orthodox Church v. Church Mut. Ins. Co.*, 476 F.Supp.2d 1135, 1139  
24 (D. Ariz. 2007) (witness did not qualify as expert, for purposes of giving an affidavit in  
25 opposition to summary judgment in bad faith case against property insurer regarding  
26 insurance claims handling practices).

1 The defense has received no disclosure with respect to Mr. Cooper other than his  
2 C.V. which was disclosed on February 18 and the State's proffer regarding Mr. Cooper  
3 provided on March 4, 2010 (attached). Mr. Cooper's training consists of a Masters in  
4 Public Administration and courses (for which dates are not provided) from the FBI and  
5 "in service training" on a dizzying variety of topics ranging from pathology to  
6 interrogation to hate crimes. Because he has not yet provided his opinions, and because  
7 the defense has not been provided with the basis for those opinions, we are not yet able to  
8 determine if these courses and his MPA degree somehow qualify him to reach the  
9 conclusions he draws. The defense does have serious concerns based on what little  
10 information is available on this topic at this time. The Court should order the State to  
11 disclose the following within five days upon threat of preclusion:

12 a complete statement as to the methods Mr. Cooper used to form his opinions and  
13 a complete statement as to his conclusions and supporting rationale,

14 whether Mr. Cooper has qualified as an expert in any forensic field and if so, what  
15 field, the name and location of the court and the name of all cases involved,

16 a copy of the transcripts of Mr. Cooper's testimony in the last five cases in which  
17 Mr. Cooper testified if a transcript has been prepared,

18 identify whether Mr. Cooper has ever failed to qualify as an expert and if so,  
19 which courts, and provide names of cases involved,

20 whether Mr. Cooper has ever worked for the defense either as a consultant or  
21 testifying expert and if so, provide the name of the defense attorney, the jurisdiction and  
22 the year employed,

23 has Mr. Cooper ever been retained by the prosecution and come to a conclusion  
24 adverse that the prosecution's position is not supported by the forensic evidence and if so,  
25 provide the names of the cases, the location of the courts and the date,

1 has Mr. Cooper ever been wrong as to a matter of forensics and if so provide the  
2 name of the case(s), the jurisdiction and the dates,

3 a list of books and specific articles that Mr. Cooper considers to be authoritative  
4 on the areas to which he is offered as an expert in this case,

5 a list of books and specific articles that Mr. Cooper relied on or consulted in  
6 coming to his findings in the instant case,

7 a copy of any retainer letter in this case, and the terms of the retainer, including the  
8 hourly rate, billing for travel time and all other pertinent terms,

9 a statement of what Mr. Cooper was told about the case, when he was told the  
10 information and by whom,

11 a statement as to any questions asked by Mr. Cooper about the State's theory of  
12 the case and who was asked and when the questions were posed,

13 a copy of his bills,

14 a chronology of Mr. Cooper's work on the case including but not limited to:

- 15 1. a time line detailing all of Mr. Cooper's involvement in the case  
16 2. emails or text messages sent or received, including but not limited to emails or  
17 texts to or from any member of the prosecutor's office, the investigating law  
18 enforcement agency, or other experts.  
19 3. all written correspondence sent or received  
20 4. notes, whether electronic, typed or handwritten  
21 5. any dictated observations regarding this case  
22 6. a list of all persons interviewed and dates of the interviews.

23 This information will assist the defense in evaluating this prong of Rule 702. This  
24 request in no way effects or waives Mr. DeMocker's motion to exclude Mr. Cooper based  
25 on the State's late disclosure of him as a witness and continued refusal to comply with  
26 Rule 15.1 disclosure requirements regarding this witness.

1       **III. Mr. Cooper's testimony Should be Precluded Under Rule 403 if it is**  
2       **Admissible, Over Objection, Under Rule 702.**

3       Even if the Court determines that Mr. Cooper's testimony is admissible under  
4 Rule 702, his testimony should be excluded pursuant to Rule 403. The probative value of  
5 Mr. Cooper's opinions on these far ranging and imprecise issues is substantially  
6 outweighed by the danger of unfair prejudice and confusion of the jury. Providing an  
7 "expert" gloss on speculation about how or why a crime occurred – particularly where  
8 there is no physical evidence to support that theory – is likely to substantially prejudice  
9 Mr. DeMocker's right to receive a fair trial. The National Academy of Science's recent  
10 report, noted that juries can be misled by scientific evidence with a false sense of  
11 significance. "Strengthening Forensic Science in the United States: A Path Forward."  
12 <http://www.nap.edu/catalog/12589.html>. It found that "... if the scientific evidence  
13 carries a false sense of significance ... the jury or court can be misled, and this could lead  
14 to wrongful conviction or exoneration. If juries lose confidence in the reliability of  
15 forensic testimony, valid evidence might be discounted, and some innocent persons might  
16 be convicted or guilty individuals acquitted." See "Strengthening Forensic Sciences in  
17 the United States," at 1-2. Mr. Cooper's testimony should be excluded on the basis of  
18 Rule 403 if it is not excluded on the basis of Rule 702.

19                               **CONCLUSION**

20       Defendant Steven DeMocker, by and through counsel, hereby requests that this  
21 Court prohibit the State from offering testimony from Gregory Cooper.

22       DATED this 10<sup>th</sup> day of March, 2010.

23  
24  
25       By: \_\_\_\_\_

26       John M. Sears  
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**ORIGINAL** of the foregoing hand delivered for  
filing this 10<sup>th</sup> day of March, 2010, with:

Jeanne Hicks  
Clerk of the Court  
Yavapai County Superior Court  
120 S. Cortez  
Prescott, AZ 86303

**COPIES** of the foregoing hand delivered this  
this 10<sup>th</sup> day of March, 2010, to:

The Hon. Thomas B. Lindberg  
Judge of the Superior Court  
Division Six  
120 S. Cortez  
Prescott, AZ 86303

Joseph C. Butner, Esq.  
Prescott Courthouse basket

